Supreme Court, U.S.
FILED
SEP 10 2015
OFFICE OF THE CLERK

No. 14-981

In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS INSTITUTE, PROJECT 21, NATIONAL ASSOCIATION OF SCHOLARS, INDIVIDUAL RIGHTS FOUNDATION, AND REASON FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), American Civil Rights Institute (ACRI), Project 21, National Association of Scholars (NAS), Individual Rights Foundation (IRF), and Reason Foundation respectfully submit this brief amicus curiae in support of Petitioner Abigail Fisher.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has extensive litigation experience in the areas of racial discrimination, racial preferences, and civil rights. PLF has participated as amicus curiae in nearly every major United States Supreme Court case involving racial classifications in the past three decades, from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), to *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary*, 134 S. Ct. 1623 (2014).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

CEO is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and resources to studying racial, ethnic, and gender discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the states, and private entities. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Schuette*, 134 S. Ct. 1623; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

ACRI is a nonprofit research and educational organization. ACRI monitors and researches laws that ban government's use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRI devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the states, and private entities. ACRI has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 133 S. Ct. 2411; *Ricci*, 557 U.S. 557; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter*, 539 U.S. 306.

Project 21 is an initiative of The National Center for Public Policy Research designed to promote the views of African Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African Americans, and all Americans, to live

and work. Project 21 has participated as amicus curiae in numerous relevant cases, including *Schuette*, 134 S. Ct. 1623; *Fisher*, 133 S. Ct. 2411; *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

NAS is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. As a group comprised of professors, graduate students, administrators, and trustees, NAS is intimately familiar with the issues relevant to the analysis of this case. NAS, CEO, ACRI, PLF, and Project 21 all participated in this case when it was previously before this Court. *See Fisher*, 133 S. Ct. 2411.

Individual Rights Foundation (IRF) was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file amicus curiae briefs in cases involving fundamental constitutional issues, including *Fisher*, 133 S. Ct. 2411, and *Ricci*, 557 U.S. 557. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues, including *Fisher*, 133 S. Ct. 2411; *Ricci*, 557 U.S. 557; *Gratz*, 539 U.S. 244; and *Grutter*, 539 U.S. 306.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether public institutions may resort to racial discrimination to attain the benefits that flow from a diverse student body when nonracially discriminatory means are available, workable, and successful.

INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Texas at Austin (University) discriminated against Abigail Fisher in the admission process because of the color of her skin. *Fisher*, 133 S. Ct. at 2413. The Equal Protection Clause mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV, cl. 1.[2] This rule admits only the most limited exceptions. "[A]ll 'governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry.'" *Grutter*, 539 U.S. at 326 (citation omitted). Accordingly, all race-based measures are subject to strict scrutiny, which requires the government to prove that its discriminatory means are "narrowly tailored" to further a "compelling" state interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

In those rare cases where the government's use of race furthers a compelling interest, this Court has emphasized that the means chosen must "work the least harm possible," *Bakke*, 438 U.S. at 308 (op. of Powell, J.), and be narrowly tailored to fit the interest "'with greater precision than any alternative means.'" *Grutter v. Bollinger*, 539 U.S. at 379 (Rehnquist, C.J., dissenting) (citation omitted). This "exact connection" between the government's race-conscious goal and the means adopted to further it is necessary because of the inherently "pernicious" nature of governmental racial classifications. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. at 720 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

Here, the University argues that its race-conscious admissions policy is narrowly tailored to attain the "educational benefits of diversity." *Fisher*, 133 S. Ct. 2421. In order for the University to satisfy this heavy burden, it must prove that its race-conscious admissions program is "necessary" to secure the

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[2] The language of Title VI of the 1964 Civil Rights Act is even more explicit. *See* 42 U.S.C. § 2000d.

educational benefits that diversity produces. *See Fisher*, 133 S. Ct. at 2420. The University must demonstrate that those benefits are real, significant, and attainable. Furthermore, a race-conscious program cannot be narrowly tailored to the benefits of diversity where the costs attendant to the governmental race-conscious action outweigh the benefits. *See Parents Involved*, 551 U.S. at 745 (plurality op.). And a race-conscious program cannot be deemed "necessary" where "a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense." *Fisher*, 133 S. Ct. at 2420 (citations omitted).

Under this "exceptionally demanding" standard, the University has failed to prove that its race-conscious program is narrow tailored. *See Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). The University assumes, without proving, that its admissions policy is inextricably linked "to the educational benefits that diversity is designed to produce." *See Grutter*, 539 U.S. at 330. The University never seriously considered the costs of selecting students based on race, or weighed those costs against the purported benefits of its race-conscious admissions program. The University never even tries to exhaust race-neutral alternatives before resorting to its race-conscious plan. For these reasons, the University's discriminatory admissions policy is not narrowly tailored to achieving the educational benefits that flow from a diverse student body.

A clear decision by this Court holding the University to the strictest demands of the Equal Protection Clause is needed because universities nationwide continue to use racial preferences in admissions. Despite over 60 years of opinions from

this Court denouncing and attempting to cabin the use of race by government, racial admissions preferences are widely used and rarely scaled back. *Compare Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (Education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."), *with Fisher*, 133 S. Ct. at 2419 ("[S]trict scrutiny must be applied to any admissions program using racial categories."). Amicus CEO published empirical studies examining the admission practices at many institutions of higher education. As detailed below, *infra* at Arg. II.A, each study concludes that public universities are using racial criteria to favor preferred minority applicants and to turn away applicants representing disfavored races.

This Court's most recent decision in *Fisher*—emphasizing the need to exhaust race-neutral measures before turning to race-based classifications—did not impel our nation's public universities to change their behavior. Responses received from public records requests submitted to public universities after *Fisher* reveal that they are not seriously considering workable race-neutral alternatives to racially selective admissions policies. Moreover, the responses indicate that public institutions are not considering the costs attendant to racial preferences, and whether those costs outweigh the purported benefits. *See Fisher*, 133 S. Ct. at 2420 (universities need to consider the costs of race-conscious measures).

So long as it remains constitutional for a university to pursue diversity through race-conscious means, race-based admissions will remain. *Cf. Schuette*, 134 S. Ct. at 1639 (Scalia, J., concurring) ("the correct understanding" of the Equal Protection

Clause does not permit discrimination in state-provided education). By holding the University's race-based policy unconstitutional this Court will save untold numbers of students from unconstitutional racial discrimination. The decision below should be reversed.

ARGUMENT

I

THE UNIVERSITY'S RACE-BASED ADMISSIONS POLICY IS NOT NARROWLY TAILORED TO ATTAIN THE EDUCATIONAL BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY

A. The University Failed To Prove That Its Race-Conscious Admissions Program Will Lead to Real and Significant Educational Benefits

The educational benefits that diversity produces are realized by enrolling a "critical mass" of underrepresented minorities on campus. *Grutter*, 539 U.S. at 333. The *Grutter* Court explained that a critical mass of underrepresented minority students helps "break down racial stereotypes, . . . promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce.'" *Id.* at 330 (citation omitted). Even if enrolling a critical mass to achieve these ends is presumed "compelling," a university is entitled to no deference on its determination that race-based means are necessary or proper to creating

a critical mass.[3] *Fisher*, 133 S. Ct. at 2420. If a university cannot prove that its race-conscious measures are necessary to achieve a critical mass of underrepresented minority students, its policy is not narrowly tailored to secure the benefits resulting from a diverse student body.

Here, the University set no real standards for evaluating what constitutes a "critical mass" of underrepresented minority students, whether race-conscious admissions help it achieve a critical mass, or when it will know that a critical mass has been attained. Accordingly, the University sorts students on the basis of race without any clear understanding of its purpose for doing so. For example, at different stages of the litigation, the University argued that its race-conscious policy was needed to achieve a critical mass of students to ensure "classroom" diversity, *see Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 244 (5th Cir. 2011), to achieve "diversity within diversity," *see Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 650-52 (5th Cir. 2014), to eliminate "racial isolation," *see id.* at 642, or accomplish other purposes. *See generally id.* at 640-60 (explaining various understandings of "critical mass" and its purpose in the University's admissions policy). Neither the University nor the court below was able to settle on a precise meaning of "critical mass." *See id.* at 666 (Garza, J., dissenting) ("[T]he majority repeatedly invokes the term 'critical mass' without even questioning its definition.").

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[3] This may be a difficult distinction to maintain. *See* Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2012-2013 Cato Sup. Ct. Rev. 63, 77. The Court has repeatedly held that deference is "fundamentally at odds" with strict scrutiny and equal protection jurisprudence. *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005).

The University's inability to define "critical mass" or recognize when it will be attained makes it impossible for the University, let alone a court, to determine whether its race-based policy is necessary to secure the benefits of diversity. The University's *ipse dixit* cannot satisfy strict scrutiny. This Court has consistently required that, before government resorts to racial preferences, it must identify the object of those preferences *with precision*. *See Shaw v. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989). Specificity is required because the means chosen to accomplish the goal must "work the least harm possible," *Bakke*, 438 U.S. at 308 (op. of Powell, J.), and be narrowly tailored to fit the interest " 'with greater precision than any alternative means.' " *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting) (citation omitted). Without a clear understanding of the goal of a university's discriminatory admissions policy, it is impossible to scrutinize whether the chosen means serve to secure those benefits in the least harmful way possible. *See Croson*, 488 U.S. at 510.

While the University argues that its race-based policy allows it to achieve a critical mass, its failure to offer any guideposts for determining how or when a critical mass was achieved makes it impossible to determine if the program is narrowly tailored to achieve the benefits of diversity. For example, if a university has already admitted a critical mass of underrepresented students (however defined), race-conscious admissions criteria are not necessary because the school has already attained the educational benefits of a diverse student body. *See Grutter*, 539 U.S. at 329. Race-conscious measures may be employed, if at all, only up to the point when

the university has enrolled a critical mass. *See Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 639-40 (1987) (even if the government could consider race in order to attain a balanced workforce, it could not do so to maintain one). A university that continues to use race-conscious measures after enrolling a critical mass of minority students can only serve the purpose of increasing minority representation outright—an unconstitutional goal. *See Bakke*, 438 U.S. at 307; *Croson*, 488 U.S. at 507. Consequently, the University's deliberate refusal to define "critical mass" must mean that the University cannot prove that race-conscious admissions are necessary to secure the benefits of diversity and the admissions policy must be declared unconstitutional. *See Fisher*, 133 S. Ct. at 2420.

Moreover, the University offered no evidence that its existing policy, however denominated, will achieve the educational benefits of diversity. Instead, the University relies on this Court's presumption that the University of Michigan's law school's race-conscious admissions in *Grutter* would produce the educational benefits of diversity. *See Fisher*, 758 F.3d at 655-57 (rejecting the view that *Grutter* does not require the University to prove how its policy will secure the educational benefits of diversity). Even so, the University of Texas undergraduate officials offer no reason to equate the purported benefits of the race-conscious measures adopted by the University of Michigan law school with the wholly undocumented benefits in Texas. Indeed, the *Grutter* Court emphasized: "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327.

There is good reason to think that the supposed benefits of the University's race-conscious policy differ from those recognized in *Grutter*. The *Grutter* Court relied on the highly selective law school's unique position as "the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332. The University claims those same benefits will result by granting racial preferences to high school graduates. *See Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009) (arguing that its policy will result in "sociopolitical leaders"). If the University's position were correct, any educational institution—from kindergarten to trade schools—could claim preferences always result in identical educational benefits. After all, every educational institution desires to mold future leaders, and each institution could cite this Court's discussion in *Grutter* for the benefits purportedly resulting from racial admissions preferences. But that is not the law. When an educational institution discriminates on the basis of race, narrow tailoring requires that it prove *independently* how racial preferences are the least harmful means to secure the educational benefits of diversity. *See Parents Involved*, 551 U.S. at 720.

The University's failure to prove that its policy will secure the educational benefits of diversity is magnified by the empirical research that has been produced since *Grutter*. In particular, the rationale and evidence underlying the educational benefits that flow from a diverse student body have been significantly undercut since the Court's *Grutter* decision. *See, e.g.*, Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 425-30 (2005) (collecting studies that the social science evidence purporting to

tout diversity's educational benefits was and is seriously flawed); Roger Clegg, *The Educational Benefits of "Diversity,"* National Review Online, Feb. 1, 2010 (describing new studies confirming that the evidence touting diversity is "marginal" and "uncertain");[4] John Rosenberg, *"Diversity" Research ~~Advances~~ ~~Progresses~~ Accumulates*, Discriminations, Feb. 6, 2010 (compiling research on the speculative benefits of race-conscious admissions).[5]

By failing to consider the evidence that its policy will not result in the educational benefits sought, the University fails to prove that its discriminatory policy is narrowly tailored to secure those benefits. *See Fisher*, 133 S. Ct. at 2420. Unfortunately, as demonstrated below, the University of Texas is not alone. Public institutions across the country are discriminating against students without questioning the utility of their admissions policies. The Court can ensure that students are treated equally under the law by holding that no educational institution's racial preferences can survive strict scrutiny via simple importation of the University of Michigan Law School's rationale. Each university is obligated to define critical mass within its own student body and identify how and when such critical mass is reached and to what end. Better yet, this Court could acknowledge that "diversity" as a compelling interest has utterly failed to cabin racial preferences in admissions and restore the clear rule that preferences can only exist as necessary to remedy intentional discrimination.

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[4] http://www.nationalreview.com/phi-beta-cons/39876/educational-benefits-diversity-roger-clegg.

[5] http://www.discriminations.us/2010/02/"diversity"-research-advances-progresses-accumulates/.

B. The University Failed To Prove That the Benefits of Its Race-Conscious Admissions Policy Outweigh the Costs

This Court explained in *Fisher* that narrow tailoring requires public universities to seriously consider whether the educational benefits of race-conscious admissions can be achieved in a less discriminatory and costly manner. 133 S. Ct. at 2421. Courts must be able to weigh the benefits of the means chosen with the costs attendant to racial preferences. "If the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). So long as the "undeniable" costs outweigh the benefits, the University simply cannot have chosen the least restrictive means to attain a "critical mass" of under-represented minority students.

Here, the benefits are undefined and the costs of the University's policy are significant. "Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). "The equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). Discrimination based on race is " 'illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society.' " *Croson*, 488 U.S. at 521 (citation omitted).

These costs are especially high in an increasingly multi-cultural and multi-ethnic society.[6] Race-based policies have "the potential to destroy confidence in the Constitution and the idea of equality," *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting), and "escalate racial hostility and conflict." *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting). Wherever governments implement policies that prefer one race over another, their destructive nature are not a matter of speculation or prediction. *See* Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* 22 (2004) (explaining the societal dangers of race-based affirmative action); Roger Clegg, *Online Fisher*

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[6] From 2000 to 2010, the number of Americans who identify as belonging to "two or more races" has increased 32.0%. Linus Yamane, *Biracial Asian Americans: Demographics and Labor Market Status* 2 (June 23, 2015), http://pzacad.pitzer.edu/~lyamane/biracialasianamerican.pdf. Further, growth in the number of individuals self-identifying as Hispanic, Asian, American Indian, Black, or Native Hawaiian has far outpaced that of individuals who self-identify as "white alone." *See* United States Census 2010, 2010 Census Data, http://www.census.gov/2010cen sus/data/; *see also* Pew Research Center, Multiracial in America (June 11, 2015), http://www.pewsocialtrends.org/2015/06/11/multi racial-in-america/#fn-20523-2 ("[I]n 2013, about 9 million Americans chose two or more racial categories when asked about their race." Indeed, there are now more "minority" than "nonminority" babies born each day in the United States. Carol Morello & Ted Mellnik, *Census: Minority Babies Are Now Majority in United States*, Wash. Post, May 17, 2012, http://www.washingtonpost.com/local/census-minority-babies-are-now-majority-in-united-states/2012/05/16/gIQA1WY8UU_story.html.

symposium: No compelling interest, no reason not to say so, SCOTUSblog (Sept. 6, 2012, 12:24 PM).[7]

The intent of the Fourteenth Amendment is to ensure that all persons will be treated as individuals, not "as simply components of a racial . . . class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks omitted, citation omitted). "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). Moreover, "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.' " *Miller*, 515 U.S. at 912 (citation omitted).

These pernicious stereotypes are present in the University's admissions policy. It classifies students according to broad racial categories of "African-American" or "Hispanic" or "Asian," *see Fisher*, 645 F. Supp. 2d at 593-99, thereby defining individuals within these groups as the embodiment of their group identities. But nothing intrinsic in these categories assures a commonality of experience. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003) ("The term 'Hispanic' clearly doesn't describe common social background; it doesn't designate a common language; and it doesn't, for that matter, describe gross physical appearance."). The same can be said of the term "Asian" which, to name a few examples, includes

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[7] http://www.scotusblog.com/2012/09/online-fisher-symposium-no-compelling-interest-no-reason-not-to-say-so/.

individuals of Japanese, Vietnamese, Indian, and Chinese descent.

This blunt group-based approach to the diversity concept contravenes the very premise of the Constitution. *Compare id.* at 14 (explaining how racial-group stereotyping rejects individualism in favor of factions) *with The Federalist No. 10* (James Madison) (explaining how the Constitution was designed to limit factionalism). Racial preferences stigmatize individuals by implying that the recipients are inferior and need special protection, thus "incit[ing] racial hostility." *Shaw*, 509 U.S. at 643. " 'Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become [ ] truly irrelevant.' " *Adarand*, 515 U.S. at 229 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)).

In addition to the numerous intrinsic costs of any racial preference program, racial preferences in university admissions cause acute harm to those who receive them. "Every academic study on the subject confirms" that "students who receive large preferences tend to get low grades." Richard H. Sander & Stuart Taylor, *Mismatch* 96 (2012); *see also*, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) (describing academic mismatch at law schools); Rogers Elliott, et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, Research in Higher Education, Vol. 37, No. 6 (1996) (mismatch at elite colleges and universities). Academic mismatch begins when elite universities lower their academic standards to admit a more racially diverse student population. Schools one or two academic tiers

below must do likewise, since the minority students who might have attended those lower ranking universities based on their own academic record are instead attending the elite colleges. The result is a significant gap in academic credentials between minority and nonminority students at all levels.[8]

Even many supporters of racial preferences acknowledge that students who attend schools where their academic credentials are substantially below those of their fellow students will tend to perform poorly. "College grades [for students admitted based on race] present a . . . sobering picture." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 72 (1998). "The grades earned by African-American students . . . often reflect their struggles to succeed academically in highly competitive academic settings." *Id.* For example, in 1990 (when the University of Texas used racial preferences in admissions), the average grade point average of African American freshmen at the University of Texas at Austin was 1.97, compared to 2.45 for nonminority freshmen, whose average SAT scores were over 100 points higher. Charles J. Sykes, *The Hollow Men: Politics and Corruption in Higher Education* 47 (1990).

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[8] Scholars identified the academic mismatch phenomenon even before race-conscious admission policies became entrenched at leading universities. *See* Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. Tol. L. Rev. 377, 384 (1970) ("[T]he policy of preferential admission has a pervasive shifting effect, causing large numbers of minority students to attend law schools whose normal admission standards they do not meet, instead of attending other law schools whose normal standard they do meet.").

These struggles tend to result in shifting majors as African American and Hispanic students find the coursework in certain disciplines too difficult or advanced given their skill level. *See* Elliott, et al., *supra*; Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003) ("African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at the nonelite schools."). Approximately 54% of African American males at Duke University switched out of engineering, natural sciences, and economics compared to just 8% of white males. Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students* 10 (Heritage Foundation, Aug. 31, 2015). The lower an African American student's academic credentials relative to the average student at his undergraduate college or university, the lower that student's grades are likely to be and the less likely the student is to graduate. Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. Lab. Econ. 289, 301, 303 (1995); Audrey Light & Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?*, 35 J. Hum. Resources 299, 301 (2000).

African American students fail or drop out of school at much higher rates than white students (19.3% vs. 8.2%). Sander, *supra*, 437 n.1, tbl. 5.5. The high drop-out rate was associated with poor performance and not financial hardship. *Id.* at 439, tbl. 5.6. In 1987, almost a quarter of African American students at M.I.T. failed to graduate. Arthur Hu, *Minorities Need More Support*, The Tech (M.I.T.), Mar. 7, 1987, at 8. Although the average math SAT

scores of the African American M.I.T. students were in the top 10% nationwide, they were in the bottom 10% at M.I.T. *Id.* A 1988 study showed that African American students at the University of California at Berkeley had a 70% drop-out rate, with SAT scores well above the national average, but significantly lower than nonminority students. John H. Bunzel, *Affirmative-Action Admissions: How It "Works" at UC Berkeley*, Nat'l Affairs, Fall 1988, at 124-25. But the average SAT scores of nonminority students at Berkeley were several hundred points higher. *Id.* These effects are replicated in lower tier schools as well: In 1997, the University of Colorado graduated only 37% of African American students compared to 72% of non African American students. Robert Lerner & Althea K. Nagai, *Racial Preferences in Colorado Higher Education* 34-36 (Center for Equal Opportunity 1997).[9]

Students in graduate school fare little better. Minority law school students who graduate still fail to pass the bar more often than white students. Sander, *supra*, at 454 (only 45% of African American law school graduates passed the bar on their first attempt as compared to over 78% of whites). That is, law school students who struggle academically because of mismatch will most likely not achieve subject matter mastery, will suffer lower pass rates on the bar, and encounter increased problems in the job market. *Id.* at 370. The poor performance of minority students at universities and law schools is not the result of students' race. It is "simply a function of disparate entering credentials, which in turn is primarily a function of the schools' use of heavy racial preferences."

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[9] http://www.eric.ed.gov/PDFS/ED418193.pdf.

Sander, *supra*, at 429. "Since many of these students who left law school would likely have performed better at a less competitive law school, they were in a very real sense victims of race-preferential admissions." Heriot, *supra*, at 23.

Racial preferences in college admissions impose significant costs on minority students. No matter where academic mismatch occurs, lower grades lead to lower levels of academic self-confidence, which in turn increases the likelihood that minority students will lose interest in continuing their education and drop out. Generations of minority students who would have succeeded without race-based admission policies experience a far greater risk of failure because of academic mismatching. Narrow tailoring requires universities to consider these costs and empirically determine that the benefits of racially discriminatory policies far outweigh the costs. *See Metro Broad.*, 497 U.S. at 602 (O'Connor, J., dissenting). Because the University here failed to do so, its race-conscious plan is unconstitutional.

C. The University Failed To Prove That Race-Neutral Measures Are Insufficient To Attain the Educational Benefits of a Diverse Student Body

Narrow tailoring requires the University to prove that race-neutral measures could not achieve the same educational benefits. *Fisher*, 758 F.3d at 644. The Equal Protection Clause forbids the University from considering race where " 'a nonracial approach . . . could promote the substantial interest about as well.' " *Id.* (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986)). "The essence of the 'narrowly

tailored' inquiry is the notion that explicit racial preferences . . . must be only a 'last resort' option." *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993).

Evaluating the availability of various means to achieve a critical mass of diversity requires the University to weigh the costs and benefits of race-conscious means against the costs and benefits of race-neutral means. *See Fisher*, 133 S. Ct. at 2420. The University's failure to engage in any cost-benefit analysis of its race-conscious program makes it exceedingly difficult to evaluate the availability of race-neutral means. Without proving that its policy is necessary to achieve the benefits of diversity—at a low cost—it is impossible to scrutinize whether race-neutral alternatives would provide the same benefits at a lower cost to individuals subject to a university's discriminatory admissions practices.

Since the educational benefits of diversity result from enrolling a critical mass of underrepresented minority students, *Grutter*, 539 U.S. at 333, race-conscious measures can only be used up to the point where a critical mass is achieved. When race-neutral measures result in the same critical mass, the costs of engaging in race-conscious policies cannot outweigh the benefits. *See Fisher*, 133 S. Ct. at 2420. Here, the University has already demonstrated it can achieve significant admission of underrepresented minorities through race-neutral means. In 2004—the last year which the University did not use racial preferences—over 20% of the incoming class was either Hispanic or African American. *See Fisher*, 758 F.3d at 649. That race-neutral plan still exists, but since 2004, the University implemented a discriminatory admissions

policy that has a *de minimis* effect on the number of underrepresented minorities admitted to the University. *See id.* at 644.

Unlike other colleges and universities that had adopted race-neutral admissions policies, the University automatically reverted to race preferences after the Supreme Court's decision in *Grutter*, 539 U.S. 306. There is no evidence the University considered any race-neutral options, nor has it documented why these options would fail to produce a critical mass of underrepresented students and the educational benefits a diverse student body provides.

The fact that the majority of universities do not use racial preferences in admissions—either by volition, because of state law, or because the school is simply not highly selective—and that those schools continue to operate and operate well, thoroughly undercuts any necessity for the use of racial preferences in admissions at the remaining schools. At least nine states have, by state constitutional amendment or statute, abandoned racial preferences in public university admissions, and leading universities in two other states voluntarily did the same.[10] In the

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[10] To date, California, Louisiana, Washington, Michigan, Arizona, Nebraska, Florida, New Hampshire, and Oklahoma all prohibit racial classifications in state university admissions. *See* Cal. Const. art. I, § 31; *La. Associated Gen. Contractors, Inc. v. Louisiana*, 669 So. 2d 1185, 1199 (La. 1996) (interpreting Louisiana Constitution as banning all racial classifications); Wash. Rev. Code Ann. § 49.60.400; Ariz. Const. art. II, § 36; Neb. Const. art. I, § 30; Fla. Exec. Order No. 99-281; N.H. Rev. Stat. Ann. § 187-A:16-a; Okla. Const. art. II, § 36A. The University of Georgia dropped its race-conscious policy after the Eleventh Circuit's decision in *Johnson v. Bd. of Regents of the Univ. of Ga.*,

(continued...)

wake of such bans, states have functioned as "laboratories for experimentation," *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring), and successfully implemented many alternatives that the University failed to consider.

Popular among states' race-neutral alternatives are "socioeconomic" preferences—also coined "class" or "income-based" preferences—which take into account an applicant's financial hardship. *See* Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 Harv. L. & Pol'y Rev. 367, 373 (2013). These preferences give extra consideration to factors like parents' income and level of education, the applicant's first generation status, and employment responsibilities. *See id.* The University of California (UC) system and the University of Washington use comprehensive reviews of applicants that considers these socioeconomic factors. *See* Kahlenberg & Potter, *supra*, at 33-34, 40. The University of Florida and University of Georgia include extra space on their applications for students to respond to questions that highlight an applicant's socioeconomic background. *See id.* at 48-49. The University of California, Hastings College of the Law reserves spots in its entering class for students who are socioeconomicly

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[10] (...continued)
263 F.3d 1234, 1237 (11th Cir. 2001). And unlike the University here, Texas A&M chose not to reinstate race preferences after the Supreme Court's decision in *Grutter*. *See* Richard D. Kahlenberg & Halley Potter, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, Century Foundation Report 27 (2012), http://tcf.org/assets/downloads/tcf-abaa.pdf.

disadvantaged.[11] Temple University, a private school, has voluntarily used similar criteria as part of its admissions process since the 1970s. *See* Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 Cal. L. Rev. 1037, 1067 (1996).

Colleges and universities have implemented other measures that likewise encompass a broader understanding of what it means to be "underrepresented." The UC system and the University of Georgia dropped legacy preferences in order to enroll students from underrepresented families. *See* Kahlenberg & Potter, *supra*, at 33-34, 48-49. The University of Florida and the University of Nebraska-Kearney also dropped legacy preferences and replaced them with preferences for first generation attendees. *See id.* at 44-45, 56-57. They also provide financial support to those students, reflecting a larger, national trend. *See id.*; *see also* Kenneth L. Marcus, Office of Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (Feb. 2004).[12]

Still other universities ramped up their recruitment efforts at underrepresented elementary schools and high schools, using various techniques to inform students and parents of available resources and encouraging them to apply, and enacting partnership programs to prepare K-12 students for higher education. *See id.* The University of Arizona and UC

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[11] *See* University of California, Hastings College of the Law, *Legal Education Opportunity Program*, http://www.uchastings.edu/academics/education/leop/index.php.

[12] http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html.

system, for example, created partnerships between their schools and primary and secondary schools, where college students receive credit for mentoring and tutoring younger students. *See id.*

Others, including the University of Michigan, expanded their transfer program and collaborated with community colleges to ease the transition into the four-year university. *See* Kahlenberg & Potter, *supra*, at 52-55. These programs give those students who were not accepted out of high school a second chance at admission. Similarly, some colleges created satellite schools, including online schools, where students can train for college or prepare to transfer to a four-year school. *See generally id.* at 26-61 (discussing various state approaches to achieving diversity through race-neutral measures). Finally, the UC system and the University of Florida enacted a percent plan akin to the program the University uses alongside its race preferences, which grants automatic admission to a given top percentage of the graduating high school class at public schools across the state. *Id.* at 33-34; 42-43.

The increase in racial diversity through the University's race-conscious plan is insignificant compared to the costs it places on all students that are significant. "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). *Grutter* championed the use of such race-neutral alternatives, and counseled universities to "draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.* at 342. There is no

evidence that the University tried any of these race-neutral alternatives. It should not be rewarded for its recalcitrance.

II

PUBLIC UNIVERSITIES CONTINUE TO FLOUT THIS COURT'S NARROW TAILORING REQUIREMENT

A. Racial Preferences in University Admissions Are Entrenched Across the Country

While we laud the universities that implemented the race-neutral admissions programs described above, other universities across the country continue to use race as a predominant factor in admissions decisions despite this Court's repeated admonition that race "seldom provide[s] a relevant basis for disparate treatment." *Croson*, 488 U.S. at 505. The Center for Equal Opportunity (CEO) has conducted studies examining the admissions practices of dozens of universities and law schools across the nation. The findings are disturbing. The differential treatment accorded to individuals of different races in these university admissions are unexplainable on grounds other than race.

The studies expose the universities' myopic focus on race by controlling for other important variables. Just as any reputable study examining the causal relationship between smoking and lung cancer would control for factors such as age and family medical history, CEO's studies controlled for important, race-neutral variables such as high school grades, standardized test scores, and residency status. The results, even after controlling for these important

variables, show that race is being used as a "decisive factor" in university admissions decisions across the country. *Gratz*, 539 U.S. at 274.

The "odds ratio" highlights the extent of racial discrimination in admissions. The ratio measures the relative odds of members of one racial group being admitted as compared with members of another racial group, while controlling for other important variables like test scores, grades, and residency status. The association between an applicant's race and his or her chances of admission to the universities examined by the CEO studies dwarf the three-to-one ratio commonly accepted to reflect a strong association—and even dwarf the 14 to 1 ratio between smoking and lung cancer. *See* Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison* 14-15 (Center for Equal Opportunity 2011).[13]

A white or Asian applicant to the University of Wisconsin, for example, is disfavored at odds of over 500 to 1 when compared to a African American or Hispanic applicant with the same SAT score. *See* Nagai, *supra*, *University of Wisconsin-Madison*, at 16. The differences are even greater when it comes to applicants with identical ACT scores. White and Asian applicants, when compared to African Americans, are disadvantaged at a rate of over 1,300 to 1. When compared to Hispanics, nearly 1,500 to 1.

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[13] http://www.ceousa.org/attachments/article/546/U.Wisc.undergrad.pdf.

University of Wisconsin-Madison
(2007 and 2008 applicant pools)

University of WI-Madison (2007 and 2008)	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	576 to 1	1,330 to 1
Hispanic over White	504 to 1	1,494 to 1
Asian over White	1 to 1	1 to 1

At North Carolina State University, a public research university located in Raleigh, the odds ratio of blacks over whites in admissions is a whopping 177 to 1. *See* John Hood, *CEO Gets a Bum Rap*, Carolina Journal Online (Nov. 8, 2005).[14]

Racial preferences are also ubiquitous in law school admissions. The data shows that law schools in Arizona, Nebraska, and elsewhere are discriminating on the basis of race by factors of hundreds.

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[14] http://www.carolinajournal.com/issues/display_story.html?id=2912.

University of Utah College of Law (2010 admissions cycle)[15]

Univ. of Utah - Law	Odds Ratio
Black over White	163 to 1
Hispanic over White	7 to 1
Asian over White	4 to 1

University of Nebraska College of Law (2006 and 2007 applicant pools)[16]

Univ. of NE - Law	Odds Ratio
Black over White	442 to 1
Hispanic over White	90 to 1
Asian over White	6 to 1

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[15] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission to the University of Utah College of Law* 1-2 (Center for Equal Opportunity 2013), http://www.ceousa.org/attachments/article/880/UtahLawSchool.pdf.

[16] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Nebraska College of Law* 15 (Center for Equal Opportunity 2008), http://www.ceousa.org/ attachments/article/544/NE_ LAW.pdf.

Arizona State University College of Law (2006 and 2007 applicant pools)[17]

ASU - Law	Odds Ratio
Black over White	1,115 to 1
Hispanic over White	85 to 1
Asian over White	2 to 1

University of Arizona College of Law (2006 and 2007 applicant pools)[18]

Univ. of Ariz. - Law	Odds Ratio
Black over White	250 to 1
Hispanic over White	18 to 1
Asian over White	3 to 1

These numbers reveal two unfortunate facts about the nature of racial preferences in universities and law schools around the country. First, they show that universities view the type of broad diversity approved by the Court in *Grutter* as synonymous with racial diversity. This Court emphasized that racial

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[17] Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at Arizona State University College of Law* 15 (Center for Equal Opportunity 2008), http://www.ceousa.org/attachments/article/541/ASU_LAW.pdf.

[18] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Arizona College of Law* 15 (Center for Equal Opportunity 2008), http://www.ceousa.org/attachments/article/577/AZ_ Law.pdf.

classifications must be limited in situations in which race *supplements* other nonracial characteristics as a part of a "highly individualized, holistic review." *Grutter*, 539 U.S. at 337. But the high odds ratios show that race *supplants* nonracial characteristics in admissions decisions, and "for some [applicants], is determinative standing alone." *Parents Involved*, 551 U.S. at 723. Thus, the diversity that universities and law schools seek today is simply another form of racial balancing, which this Court rejected as "patently unconstitutional." 539 U.S. at 330.

Second, these studies corroborate more anecdotal reports of racial discrimination in university admissions nationwide. For example, Asians are frequently discriminated against at least as much, and sometimes even more than whites. *See* Russell K. Nieli, *How Diversity Punishes Asians, Poor Whites and Lots of Others*, Minding the Campus, July 12, 2010;[19] Yunlei Yang, *Asian Americans Would Lose Out Under Affirmative Action*, L.A. Times, Oct. 1, 2014;[20] *see also Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, et al.*, No. 1:14-cv-14176 (D. Mass. filed Nov. 17, 2014) (lawsuit alleging rampant racial discrimination against Asian students); *Students for Fair Admissions, Inc. v. Univ. of North Carolina, et al.*, No. 1:14-cv-00954 (M.D.N.C. filed Nov. 17, 2014) (same). When viewed together with admissions data, these reports confirm that "every time the government uses racial criteria to 'bring the

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[19] http://www.mindingthecampus.com/2010/07/how_diversity_punishes_asians/.

[20] http://www.latimes.com/opinion/opinion-la/la-ol-affirmative-action-sca5-asian-americans-20141001-story.html.

races together,' someone gets excluded . . . and . . . suffers an injury solely because of his or her race." *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (internal citation omitted).

B. Many Universities' Reaction to the Court's Decision in *Fisher* Is Business as Usual

It is no secret that universities across the nation have repeatedly ignored this Court's instructions for schools to limit their use of racial classifications. Their reaction to *Fisher* was no different. Two years ago, this Court reiterated that government action which "'treats a person differently on account of his race or ethnic origin is inherently suspect.'" *Fisher*, 133 S. Ct. at 2419 (citation omitted). "Good faith" would not "forgive an impermissible consideration of race," and that "'the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight.'" *Id.* at 2421 (quoting *Croson*, 488 U.S. at 500).

The decision was hardly groundbreaking. For decades, the Court has warned about the harms resulting from racial preferences. Government programs favoring some races over others "can be the most divisive of all policies," *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). Racial classifications are thus barely tolerable, and may only be used, if at all, after "essential safeguard[s]" have been satisfied. *Id.* The entity seeking to justify its use of racial classifications must prove that it considered the undeniable costs of lumping individuals in racial groups, and that any purported benefits resulting from its use of crude racial categories could not be accomplished "about as well" without categorizing

individuals on the basis of race. *Fisher*, 133 S. Ct. at 2420 (quoting *Wygant*, 476 U.S. at 280 n.6).

Universities continue to disregard the "undeniable" costs of racial preferences. *Parents Involved*, 551 U.S. at 745. After this Court's decision in *Fisher*, CEO sent public records requests to 22 public universities. The requests sought all documents that "mention" a number of contemporary articles and studies discussing the costs of racial preferences at public universities.[21] Only two universities provided any information responsive to the request. Eleven conceded that they had no responsive documents,[22] and the rest ignored the public records request altogether.

Nor do universities come close to fulfilling their constitutional obligation to consider workable race-neutral alternatives. Public records requests[23] to the University of Connecticut and the University of Virginia after *Fisher* sought documents showing that the universities had considered race-neutral alternatives before resorting to racial classifications, and documents showing the reasons the universities

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[21] The 22 records requests are available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/CEO- FOIA-letters.pdf.

[22] The eleven universities that had no responsive documents were University of Connecticut, Clemson University, Georgia Institute of Technology, University of Florida, University of Iowa, University of Maryland, Purdue University, Texas A&M University, Virginia Polytechnic Institute and State University, and University of Wisconsin-Madison. True and correct copies of these responses are available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/FOIA-responses.pdf.

[23] The records requests to the University of Connecticut and the University of Virginia are available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/UVa -and-UConn-requests.pdf.

believed that those alternatives could not produce the same educational benefits as racial preferences. The University of Connecticut responded rather flippantly, producing only a link to its admissions page and a paper copy of the amicus brief it signed onto in *Fisher*.[24] The University of Virginia responded with its admissions reader sheet and a letter stating the bare conclusion that the school's consideration of race "is consistent with strict scrutiny."[25] Neither university responded with documents showing any examination, much less a serious examination of race-neutral alternatives before turning to racial preferences.

There is no evidence that universities have weighed the undeniable costs of racial preferences against the benefits that purportedly result from classifying individuals on the basis of race. And there is no evidence that universities have given serious thought to whether these benefits can be achieved though race-neutral means. This demonstrates that

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[24] The University of Connecticut's response is available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/UConn-Response-of-January-21.pdf. A copy of the brief the University of Connecticut signed onto in *Fisher* is available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_respondentamcuappalachianunivetal.authcheckdam.pdf.

[25] The University of Virginia's response is available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/UVA-response-letter.pdf.

universities nationwide continue to flout the Court's limits on the use of race in admissions decisions.[26]

CONCLUSION

Our nation is increasingly multiethnic and multiracial, and individual Americans are more and more likely to be multi-ethnic and multiracial. In such a nation, it is dangerous to allow divisive racial and ethnic discrimination by public institutions to become wider and more entrenched. Neither *Grutter* nor *Fisher* sanctioned the unquestioning use of race by our nation's public universities. Nevertheless, they continue to use racial preferences unheeded by this Court's decisions. For the foregoing reasons, Amici

[26] Universities have entire departments devoted to racial preferences, making bureaucratic inertia a strong force in preventing schools from voluntarily complying with their constitutional "imperative of racial neutrality." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring). The University of Texas's Division of Diversity and Engagement, for example, consists of "dozens of units, organizations and partnerships," "an active advisory council of . . . community members," and "many local partners." University of Texas at Austin, About DDCE, http://www.utexas.edu/diversity/about/. As Justice Scalia predicted the last time around, "[t]here would be a large number of people [] out of a job" if the University voluntary reverted to a race-neutral program. Transcript of Oral Argument at 58, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2012) (No. 11-345).

respectfully request the Court reverse the decision below.

DATED: September, 2015.

Respectfully submitted,

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